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In the Supreme Court of the United States

OCTOBER TERM, 1975

GREGORY NORTON, JR., ETC., APPELLANT

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the single-judge district court concerning the nonconstitutional aspect of this case is reported at 352 F. Supp. 596. The first opinion of the three-judge district court is reported at 364 F. Supp. 1117. This Court vacated the judgment of the three-judge court and remanded the case for reconsideration, 418 U.S. 902. The district court's opinion upon remand is reported at 390 F. Supp. 1084.

JURISDICTION

The judgment of the three-judge district court (A. 96) was entered on February 28, 1975. Notice of appeal (A. 97) was filed on March 17, 1975. The jurisdictional statement was filed on March 19, 1975. On June 30, 1975, the Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 99). While appellant has invoked this Court's jurisdiction under 28 U.S.C. 1253, we show below (*infra*, pp. 8-27), that this Court lacks jurisdiction over the appeal.

QUESTIONS PRESENTED

1. Whether the three-judge district court had jurisdiction to enjoin operation of certain provisions of the Social Security Act.

2. Whether Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act deny due process insofar as they condition certain illegitimate children's receipt of surviving child's insurance benefits upon a showing that a deceased wage-earner was their parent and was, at the time of his death, living with them or contributing to their support.

STATUTES INVOLVED

The pertinent statutory provisions of Title II of the Social Security Act, 49 Stat. 622, as added and amended, 42 U.S.C. 402, *et seq.*, are set forth in the appendix to this brief, *infra*, pp. 1a-8a.

STATEMENT

1. This is a direct appeal from a decision of a three-judge court sustaining the constitutionality of Sections 202(d)(3) and 216(h)(3)(C)(ii) of the Social Security Act, as added and amended, 42 U.S.C. 402(d)(3) and 416(h)(3)(C)(ii),[1] which, in the case of certain illegitimate children, condition the payment of child's survivor benefits upon a showing, satisfactory to the Secretary, that the deceased wage-earner was the child's parent and that the wage-earner "was living with or contributing to the support of the [child] at the time [the wage-earner] died." At the outset, therefore, we describe the statutory scheme governing the payment of child's survivor benefits.

Surviving child's insurance benefits are payable to children under the age of 18 (or, in the case of full-time students, under the age of 22) who were dependent upon a deceased wage-earner at the time of his death. Section 202(d)(1)(B) and (d)(1)(C) of the Act. The Act presumes as a matter of law, however, that children who have not been adopted by another individual or individuals are dependent upon their parents. Section 202(d)(3) of the Act. Illegitimate children who have no adoptive parents are similarly presumed by the Act to be dependent (1) upon natural parents who went through a marriage ceremony that was rendered invalid by a non-

[1] See App., *infra*, pp. 2a, 7a-8a.

obvious legal impediment or (2) upon a natural parent who (a) had acknowledged in writing that the child was his son or daughter, (b) had been decreed by a court to be the child's father, or (c) had been ordered by a court to contribute to the support of the child because the child was his son or daughter. Section 216(h)(2)(B) and (h)(3)(C)(i) of the Act.

Other children must establish their dependency upon the deceased parental wage-earner in order to be entitled to child's survivor benefits. Thus a child (whether legitimate or illegitimate) who has been adopted by another individual or individuals, or an illegitimate child who does not fall within any of the categories to which the presumption of dependency applies, in order to receive child's survivor benefits on the basis of a deceased wage-earner's Social Security account, must establish both that the wage-earner was his parent and that the wage-earner was living with or contributing to his support at the time of death. Sections 202(d)(3) and 216(h)(3)(C). Similarly, a stepchild claiming under the Social Security account of his stepparent must establish that, at the time of death, he was living with or receiving at least one-half of his support from that stepparent. Section 202(d)(4).

2. The named appellant herein, Gregory Norton, Jr., is an illegitimate child who sought child's insurance benefits after the death of Gregory Norton, Sr., his putative father. Appellant did not fall within any of the categories of illegitimate children entitled

to the presumption of dependency: he was unable to furnish a written acknowledgment of paternity by, or any evidence of entry of a support order or paternity decree against, Gregory Norton, Sr. Accordingly, appellant sought to establish, under Section 216(h)(3)(C)(ii), that Gregory Norton, Sr., was his natural father and was living with or contributing to his support at the time of death. After an administrative hearing, the hearing examiner found that Gregory Norton, Sr., was appellant's father but that he had neither been living with appellant, nor contributing to his support, at the time of death (A. 13-19).

Appellant then instituted this action in the United States District Court for the District of Maryland, challenging the hearing examiner's finding that he had failed to prove his dependency upon his father. Alternatively, appellant, on behalf of himself and all other persons similarly situated, sought to enjoin the operation of Section 216(h)(3)(C)(ii) as invidiously discriminatory against illegitimate children in violation of the Fifth Amendment. A single-judge district court sustained the hearing examiner's finding that appellant had failed to meet his burden of proof under the challenged statute (A. 22-29). A three-judge court was then convened pursuant to 28 U.S.C. 2282 and 2284 to adjudicate appellant's constitutional claim. That court sustained the constitutionality of the statute (A. 31-54). Thereafter, this Court vacated the judgment of the three-judge court and re-

manded the case for reconsideration in light of *Jimenez* v. *Weinberger*, 417 U.S. 628. 418 U.S. 902. Upon reconsideration, the district court again sustained the challenged statute, with one judge dissenting (A. 70-95).[2]

SUMMARY OF ARGUMENT

Here, as in *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, the district court lacked jurisdiction over so much of the case as concerns the class, since there was no showing that the members of the class met the jurisdictional predicate of Section 205 (g). As in that case, there was here no allegation that the class members had even filed applications for benefits, and thus no indication that they sought review of any decision of the Secretary with regard to such applications. Moreover, as in *Salfi*, alternative jurisdictional bases for suit are precluded by Section 205(h). Although the district court had jurisdiction over the named plaintiff under Section 205 (g), that Section does not authorize the grant of an injunction against the enforcement of the Act. Accordingly, the convocation of a three-judge district court was not required pursuant to 28 U.S.C. 2282, and this Court lacks jurisdiction on direct appeal under 28 U.S.C. 1253. Since the three-judge court

[2] However, in *Lucas* v. *Weinberger*, D. R.I., C.A. No. 4845, decided March 21, 1975, a single-judge district court held the statute unconstitutional. The government has appealed directly to this Court under 28 U.S.C. 1252. *Mathews* v. *Lucas*, No. 75-88, probable jurisdiction noted October 6, 1975.

sustained the constitutionality of the statute, there also is no jurisdiction under 28 U.S.C. 1252.

In any event, the decision below was correct. The Social Security Act provides insurance benefits to surviving dependent children of deceased wage-earners. It is designed to replace the support lost by the death of the wage-earner, and not to provide supplementary income to those who might have claimed support from the wage-earner during his lifetime, but did not do so. The classification to which petitioner objects is designed to distinguish those cases in which the dependency of the child on the wage-earner can reasonably be inferred from those in which it cannot, and to require proof of actual support only in the latter situation. But even if it were, as appellant contends, a classification based on illegitimacy, this Court's decisions do not indicate that strict scrutiny would be required.

The challenged classification is entirely reasonable: it requires either some showing from which dependency can plausibly be inferred, or else proof of actual support. The fact that some children who are deemed dependent under the statutory provisions may not actually be dependent does not render the classification irrational; the categorization serves the legitimate purpose of paying benefits to all dependent children without incurring the administrative burden of case-by-case determinations where there is some basis for presuming dependency. Moreover, the requirements imposed upon the class appellant represents, *i.e.*, of proving that the claimant lived with or

was receiving support from the wage-earner at the time of death, tend to eliminate the need to make paternity determinations in doubtful cases. Finally, since any illegitimate child who can demonstrate dependency is entitled to benefits, the statutory provisions at issue here contain no blanket exclusion of illegitimates.

ARGUMENT

I

THE THREE-JUDGE DISTRICT COURT LACKED JURISDICTION TO ENJOIN OPERATION OF THE ACT

A. The District Court Lacked Jurisdiction Over The Class Aspects of This Suit

Under this Court's decision in *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, the district court lacked jurisdiction over so much of appellant's suit as concerned the class.

1. The named plaintiffs in *Salfi*, a widow whose husband died within nine months of the date of their marriage and her daughter by a previous marriage, had filed applications with the Secretary for mother's and child's insurance benefits. The applications were denied both initially and upon reconsideration at the regional level, because the plaintiffs had not met the duration-of-relationship (marriage for nine months) requirement of Section 216(c)(5) of the Social Security Act, 42 U.S.C. 416(c)(5). Contending that that requirement denied due process, the plaintiffs then instituted a suit for declaratory and injunctive

relief and money damages on behalf of themselves and all others who had been rendered ineligible for benefits as a result of the duration-of-relationship requirement. A three-judge district court granted the requested relief, and the Secretary appealed directly to this Court.

The Court first considered whether the district court had correctly asserted jurisdiction. The second sentence of Section 205(h) of the Act provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." The Court determined that the provision precluded the district court from asserting jurisdiction over the named plaintiffs' complaint, which sought review of the Secretary's decision, at the regional level, denying their application for benefits, "save as [jurisdiction is] provided [by Section 205(g) of] the Act" (slip op. at 6).

Section 205(g) confers jurisdiction upon the federal district courts to review "any final decision of the Secretary made after a hearing * * *." Although the decision denying the plaintiffs' application for benefits had not been made after a hearing, the Court held that the district court had jurisdiction to hear plaintiffs' suit on their own behalf because (1) "a hearing would be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law * * *" (slip op. at 15) and (2) the Secretary had determined

that the reconsideration decision was "final" within the meaning of Section 205(g).

The action on behalf of the members of the class did not seek review of any "findings of fact or decision of the Secretary" within the meaning of the second sentence of Section 205(h). But that action was brought to recover on the class members' claims for survivors' benefits and, the Court noted (slip op. at 4-5), the third sentence of Section 205(h) expressly provides:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§§ 1331, *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

Accordingly, the Court held that the district court had lacked jurisdiction over the claims of the unnamed members of the class (slip op. at 12):

> As to class members, * * * the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g). Other sources of jurisdiction being foreclosed by § 405(h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

In this case, appellant's claim for benefits was denied by the Secretary in a "final decision * * * made

after a hearing." See A. 13, 20. Thus, under Section 205(g), the district court had jurisdiction over appellant's individual action for review of the Secretary's decision. But, under *Salfi*, the district court had no jurisdiction over so much of appellant's complaint as concerned the class of "persons otherwise eligible for child's insurance benefits under 42 U.S.C. § 402(d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that they be living with or supported by their father on the date of his death" (A. 35). Here, as in *Salfi*, "the complaint is deficient in that it contains no allegations that [the members of the class] have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise * * *" (slip op. at 12). Since, as in *Salfi*, the unnamed class members here failed to meet the jurisdictional predicate of Section 205(g), *i.e.*, a final decision by the Secretary made after a hearing to which they were parties, the district court lacked jurisdiction over so much of the complaint as concerns the class.

Appellant apparently contends (Br. 23) that the phrase "otherwise eligible" in the district court's definition of the class restricts that class to persons who have already satisfied the exhaustion requirement of Section 205(g). But the class definition found deficient in *Salfi* also referred to persons "otherwise eligible." *Salfi* v. *Weinberger*, 373 F. Supp. 961, 966 (N.D. Calif.). That phrase is not a talis-

manic invocation of the exhaustion doctrine. To the contrary, it is clear that in broadly defining the class without express reference to the requirement of exhaustion, neither appellant (A. 6) nor the district court (A. 35) gave any consideration to that requirement.[3] Thus the class as defined clearly lay outside the court's jurisdiction under Section 205(g).

Moreover, Section 205(g) permits a suit to be brought only to review "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party." This language manifests a congressional intention of barring class suits and permitting adjudication only of individual claims. Such case-by-case adjudication of individual claims is the only appropriate means for review of administrative decisions, such as those of the Secretary with regard to applications for child's survivor benefits, that inevitably turn upon particular facts. Here, for example, the Secretary found that appellant's father was not living with appellant or contributing to his

[3] Moreover, Section 205(g) requires that an action for review be instituted within 60 days after the mailing of notice of the Secretary's decision. Nothing in the court's definition of the class purports to meet that requirement, which as a condition on a limited waiver of sovereign immunity cannot itself be waived by the Secretary. See *Munro* v. *United States*, 303 U.S. 36; *Whipp* v. *Weinberger*, 505 F.2d 800 (C.A. 6). But see *Salfi*, *supra*, slip op. at 12. Indeed, there is no evidence in the record that, but for appellant, there existed any such class of applicants for child's survivor benefits who had exhausted their administrative remedies within 60 days before the date appellant's complaint was filed.

support at the time of death.[4] The question whether that finding was supported by substantial evidence is unique to appellant; it is not susceptible to resolution in a class action. Similarly unique factual issues would be present in an action brought by any other member of the class appellant purports to represent. Congress understood that resolution of such issues must be on a case-by-case basis. The fact that claimants presenting different factual claims nevertheless share a common constitutional claim does not make proper a procedure, such as a class action, designed to by-pass consideration of the separate factual issues and force class-wide adjudication of a question of constitutional law. Congress has provided in Section 205(g), as an exclusive remedy, an orderly means for litigating individual claims under the Social Security Act; there is no room or need for class actions under that provision.

2. Appellant further argues (Br. 24-34) that jurisdiction over the class existed apart from Section 205(g), under either the mandamus statute, 28 U.S.C. 1361, or the Administrative Procedure Act ("APA"), 5 U.S.C. 701, *et seq.* But that argument is contrary to this Court's holding in *Salfi*, ignores

[4] In his jurisdictional statement, appellant sought review of this determination. He has not discussed that issue in his brief on the merits. Even if, contrary to our contentions here, this Court has jurisdiction over appellant's appeal, we do not believe that it is necessary for the Court to undertake plenary review of that essentially factual issue, which was thoroughly reviewed and correctly decided by both the single-judge and the three-judge district courts (A. 22-29, 34-35).

the evident congressional purpose, and would, if sustained, lead to anomalous results that Congress could not have intended.

a. Appellant's argument is that the third sentence of Section 205(h) precludes only the exercise of federal-question jurisdiction, not the exercise of mandamus or APA jurisdiction. The basis for this argument is that that sentence by its terms bars only actions brought under former "§ 41 of Title 28," which "prior to the 1948 recodification of Title 28 * * * contained all of that title's [general] grants of jurisdiction to United States district courts * * *" (*Salfi, supra,* slip op. at 5, n. 3), whereas the mandamus statute and the Administrative Procedure Act were enacted after the enactment of Section 205(h) and were not comprehended within 28 U.S.C. (1946 ed.) 41 (hereinafter referred to as former 28 U.S.C. 41).[5] In other words, appellant argues that jurisdictional statutes enacted after the enactment of Section

[5] Although appellant apparently also contends that the district court possessed mandamus or APA jurisdiction over his individual claim, that contention is without merit. Appellant's individual action, which seeks review of a decision of the Secretary, is governed not only by the *third* sentence of Section 205(h), but also by the *second,* which precludes such review "except as herein provided," *i.e.,* except as provided by Section 205(g). Thus, whatever scope appellant may attribute to the third sentence, the second sentence flatly bars the district courts from exercising mandamus or APA jurisdiction over actions, such as that brought by appellant on his own behalf, instituted to obtain review of a decision of the Secretary. See also pp. 5-8 of our supplemental and reply brief in *Mathews* v. *Eldridge,* No. 74-204.

205(h), and not as an amendment to former 28 U.S.C. 41, confer jurisdiction over claims arising under the Social Security Act, without regard to the broad jurisdictional bar interposed by the third sentence of Section 205(h).

That argument was rejected by this Court in *Salfi.* In *Salfi,* as here, the plaintiffs had alleged jurisdiction under, *inter alia,* the mandamus statute and the Administrative Procedure Act. See p. 7 of the *Salfi* Appendix. This Court, however, expressly held that "[o]ther sources of jurisdiction [are] foreclosed by § 405(h)" (slip op. at 12) and ordered dismissal of so much of the complaint as concerned the class, due to the class' failure to "satisfy the requirements for jurisdiction under 42 U.S.C. § 405(g)" (*ibid.*).

b. The *Salfi* decision furthers the evident congressional objective of freeing the courts from the burden of premature and unnecessary Social Security litigation. That objective emerges clearly from a close analysis of Section 205(h). The second sentence of that Section imposes upon all litigants seeking review of any "findings of fact or decision of the Secretary" the exhaustion requirement of Section 205(g). The third sentence of Section 205(h) deals comprehensively with all actions involving claims under Title II of the Act, whether or not adjudication of those claims would entail review of findings of fact or a decision by the Secretary. As the Court noted in *Salfi* (see p. 14, *supra*), that sentence by its terms bars actions brought under the former 28 U.S.C. 41, which, at the time Section 205(h) was

enacted in 1939 (53 Stat. 1371), contained all of Title 28's possibly relevant grants of jurisdiction to United States district courts. By referring to that provision, Congress evidently intended to effectuate a comprehensive denial of Title 28 jurisdiction. Thus the statutory scheme bars all actions asserting claims under the Social Security Act, except for actions seeking review of findings or a decision by the Secretary, and bars the latter actions as well, except insofar as they meet the requirements of Section 205 (g).

Later grants of jurisdiction to the district courts should not be interpreted as impliedly altering this statutory scheme, whether or not such grants were technically comprehended within the former 28 U.S.C. 41. In the absence of an express congressional intent to the contrary, such later-enacted jurisdictional provisions should be read as subject to the broad jurisdictional bar of Section 205(h). And there is nothing in the legislative history of either the mandamus statute or the Administrative Procedure Act[6]

[6] We do not here concede that the Administrative Procedure Act constitutes an independent grant of jurisdiction. The courts of appeals are divided on this question. Compare, *e.g.*, *Bramblett* v. *Desobry*, 490 F.2d 405 (C.A. 6), certiorari denied, 419 U.S. 872, with *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (C.A. D.C.). We note here only that the Act would, at most, confer jurisdiction to try actions seeking review of "[a]gency action made reviewable by statute and [certain other] final agency action" (5 U.S.C. 704), brought by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. 702). Thus that Act would under no circumstances confer jurisdiction over the suit brought on behalf of the unnamed class members here, who were not affected by the Secretary's denial of benefits to appellant.

that would suggest a congressional intention of fundamentally reorganizing the statutory scheme governing judicial review in Social Security cases.

c. Appellant notes (Br. 25) that in 1939 the United States District Court for the District of Columbia had jurisdiction over suits for mandamus against federal officials, which derived not from Title 28 but from the pre-cession laws of Maryland. Appellant argues that the third sentence of Section 205 (h) preserved this jurisdiction over actions to recover on claims arising under Title II of the Social Security Act, and that the later enactment of the mandamus statute merely extended such jurisdiction to the other federal district courts. We disagree. For the reasons set forth above, it is clear that Congress intended in Section 205(h) to assert sovereign immunity as a bar to judicial consideration of all suits to recover on such claims, except as jurisdiction was provided by Section 205(g). Appellant's argument to the contrary makes nonsense of the statutory scheme. There is no apparent reason, and appellant suggests none, why Congress would have carefully foreclosed all sources of jurisdiction for all federal district courts but one, which would exercise the extraordinary, but inherently limited, power of mandamus.

But appellant's argument confronts a more fundamental paradox as well. The second sentence of Section 205(h), together with Section 205(g), bars *all* actions for review of nonfinal decisions of the Secretary. It is clear beyond debate that that sentence prohibits such actions from being brought in the guise of suits for mandamus: it expressly allows review of such actions only "as herein provided," *i.e.*, as provided by Section 205(g). Thus a claimant who has obtained an initial or interim adverse decision by the Secretary may not secure judicial review until he exhausts his administrative remedies; and once he has exhausted his remedies, review is available only under Section 205(g) and not under any mandamus statute. But, paradoxically, under appellant's argument the federal district courts would have mandamus jurisdiction over those suits that are brought by individuals who have not yet filed a claim with, or obtained an initial decision from, the Secretary. In other words, appellant's argument resolves into the contention that Congress intended to preserve the unique mandamus jurisdiction of the District of Columbia courts, but only with respect to claims concerning which there had been no findings of fact or decision by the Secretary, *i.e.*, only with respect to the claims *least* ripe for judicial review. That anomalous result would advance no sound policy. Congress cannot be assumed to have intended it.

B. The District Court's Jurisdiction Over Appellant's Individual Claim Did Not Carry With It Authority To Enjoin The Operation Of The Act

As we have demonstrated above, the district court had no jurisdiction over so much of the complaint as concerned the class, and its jurisdiction over appellant's individual claim derived exclusively from Section 205(g) of the Social Security Act. We now show that the court had no authority under that provision to enjoin the operation of the Act.

1. This Court correctly noted in *Salfi* that the text of Section 205(g) "contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court" (slip op. at 11, n. 8): nothing in Section 205(g) suggests that Congress intended to authorize the district courts assuming jurisdiction thereunder to exercise the equitable power to enjoin the operation of a federal statute. To the contrary, the grant of jurisdiction is limited to the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute confers no power beyond that necessary to enforce decrees in individual cases.[7]

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[7] In contrast, see, *e.g.*, 28 U.S.C. 2349 (governing review of certain administrative orders in the courts of appeals), which expressly authorizes the court to enter a judgment "determining the validity of, and enjoining, * * * in whole or in part, the order of the agency." See also 15 U.S.C. 21(c) and 45(c).

Equitable remedies such as injunction are, of course, extraordinary forms of relief, available only where there is no adequate remedy of law. This is so because, unlike the traditional legal remedies, injunctions are coercive instruments, "wholly preventive, prohibitory, or protective." 4 Pomeroy, *Equity Jurisprudence* 934 (5th ed.). Congress could reasonably determine that it is inappropriate, unseemly, and unnecessary for the courts to subject the Secretary to such coercion when the basic dispute between the individual plaintiff and the Secretary is merely whether the Secretary erred in deciding a question of fact or law adversely to the plaintiff—a dispute that may in all appropriate cases be finally resolved in favor of the plaintiff by the simple expedient of "modifying, or reversing," the Secretary's decision.[8] Thus the absence of any express language in Section 205 (g) empowering the district court to exercise injunctive powers should not be regarded as a mere inadvertence. To the contrary, it appears to represent the considered determination by Congress to withhold

[8] The legislative history indicates that Congress intended only that "any individual may obtain a review of any final decision of the Board made after a hearing to which he was a party * * *" (H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939)), *i.e.*, to permit judicial review of the Secretary's determinations of individual cases, not to subject the entire administration of the statute to judicial interdiction.

such powers from the courts in this class of cases, and to confine the courts to the remedies of affirmance, modification, and reversal spelled out in the statute, and to the powers necessary to enforce those remedies in individual cases.[9]

It is especially significant in this context that, as we have shown, Sections 205(g) and (h) provide only for case-by-case review of individual claims, after the individual has exhausted his administrative remedies. Such a statutory scheme renders superfluous the exercise of injunctive power: under such a scheme, every claimant properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of an injunction restraining the operation of the statute. If the claimant's contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). An order reversing the Secretary's decision and requiring payment of benefits is tantamount to the entry of a money judgment in the plaintiff's behalf and provides him with full compensation for the value of his claim; it therefore

[9] In the exercise of those powers, a court may of course issue an order requiring the payment of benefits to a particular claimant. But such an order enforcing a judgment in a particular case does not enjoin the operation of the statute within the meaning of 28 U.S.C. 2282. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 153-155; *Salfi, supra*, slip op. at 11, n. 8.

constitutes an adequate and complete remedy at law and thus excludes the entry of further equitable relief. 4 Pomeroy, *supra*, at 936. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 404.

Further injunctive relief would have no utility to the claimant. In this case, for example, appellant's individual claim would be fully satisfied by an order reversing the Secretary's denial of benefits. The injunctive relief he seeks is, as a practical matter, not for himself but for that class of persons who, unlike appellant, have not exhausted their administrative remedies and therefore as to whom there is no decision of the Secretary subject to affirmance, modification, or reversal. But Congress, in denying the district court's jurisdiction to consider the claims of that class, must be deemed to have barred the courts from entertaining requests for broad injunctive relief on its behalf.[10]

2. This is a case, therefore, properly calling for the application of the well-settled principles summarized in *United States* v. *Babcock*, 250 U.S. 328, 331:

> (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. * * * (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive.

[10] Although, as appellant points out (Br. 21), the lack of an injunctive remedy could conceivably lead to a multiplicity of suits if the government chose not to seek direct review in this Court under 28 U.S.C. 1252 of a district court determination that a part of the Act is unconstitutional, as a practical matter such a result does not appear likely. Efficient administration of the Act requires prompt resolution of substantial questions concerning the constitutionality of any of its provisions.

As discussed above, both the text of Section 205(g) and the general statutory scheme governing review of social security cases demonstrate that Congress in such cases intended to provide a special and exclusive remedy, *i.e.*, judicial review of individual decisions of the Secretary made after an administrative hearing, and to withhold any general equitable power from the district court. Accordingly, this case is not governed by the decisions of this Court that infer the existence of broad equitable authority when Congress has, in the pertinent legislation, explicitly authorized a court to exercise its equitable powers. Those decisions establish that a limited grant of equity jurisdiction need not be construed as barring the courts from providing complete equitable relief. See, *e.g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292. The predicate, however, for the application of the principle for which such decisions stand is a congressional manifestation of a determination to vest the reviewing court with at least a modicum of equity jurisdiction. Thus, in *Porter* v. *Warner Co.*, 328 U.S. 395, involving the power of the district court under Section 205(a) of the Emergency Price Control Act of 1942 to order restitution of rents collected by a landlord in excess of the maximum permitted by the statute, the Court noted that the stat-

ute "expressly envisages applications by the Administrator for orders enjoining violations of the Act * * *" (328 U.S. at 399) and thus it was appropriate to effectuate the statutory objective by inferring the existence of the further equitable power to order restitution. In determining that Congress had not intended to preclude restitution the Court stated (328 U.S. at 403):

> This is not a situation where a statute has created a right and has provided a special and exclusive remedy, thereby negativing any jurisdiction that might otherwise be asserted. *United States* v. *Babcock*, 250 U.S. 328. * * * Rather it is an occasion where Congress has utilized, save in one aspect, the broad equitable jurisdiction that inheres in courts * * *.

See also *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, and *United States* v. *Morgan*, 307 U.S. 183, all of which infer a grant of broad equitable authority from a statute containing an express, but limited, grant of equitable power.

Unlike the statutory provisions involved in the above decisions, however, Section 205(g) contains no grant of equitable power; Congress did not signify in that statute its intent that the district court shall exercise equity jurisdiction of any kind. Rather, both the language of the statute and the legislative scheme

indicate that Congress intended to withhold such authority from the district court. There is, therefore, no warrant for the appellant's contention that the power to enjoin a federal statute may simply be inferred.

It follows from the foregoing that this Court lacks jurisdiction of this appeal. For, as the Court itself has said (*Salfi*, *supra*, slip op. at 11, n. 8):

> If a § 405(g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U.S.C. § 2282, and [the Court is] without jurisdiction under 28 U.S.C. § 1253.

Convocation of a three-judge district court is required under 28 U.S.C. 2282 when a plaintiff requests an "injunction restraining the enforcement * * * of any Act of Congress for repugnance to the Constitution of the United States * * *." But Section 2282 can operate only where there is jurisdiction in the district court to grant the requested injunctive relief. Since Section 205(g) does not authorize the courts to enjoin the operation of provisions of the Social Security Act, the district court in this case lacked jurisdiction to entertain the appellant's request for such a decree and the convening of a three-judge court was therefore improper. Cf. *Richardson* v. *Morris*, 409 U.S. 464. Consequently, this Court lacks jurisdiction of this direct appeal under 28 U.S.C. 1253, which authorizes appeals only in cases "required * * * to be heard and determined by a district court of three judges." See *Swift & Co.* v. *Wickham*, 382 U.S. 111,

114.[11] This Court also lacks jurisdiction under 28 U.S.C. 1252, for the district court sustained the constitutionality of the challenged statutory provisions. Cf. *Salfi*, *supra*, slip op. at 11, n. 8. In these circumstances, the Court should vacate the judgment below to permit entry of a fresh judgment, from which appellant may, if he so desires, appeal to the court of appeals. See, *e.g.*, *Dickson* v. *Ford*, 419 U.S. 1085.

In any event, as we now show, the three-judge district court's decision on the merits was correct; the challenged statutory provisions are constitutional.

[11] This court re-emphasized last term that the provisions relating to three-judge courts are to be narrowly construed in light of their underlying purpose (*Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 97-98):

> Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge-court procedure is not "a measure of broad social policy to be construed with great liberality." * * *
>
> The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge-court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration.

Accord: *MTM, Inc.* v. *Baxley*, 420 U.S. 799.

II

SECTIONS 202(d)(3) AND 216(h)(3)(C)(ii) DO NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Challenged Statutory Provisions Must Be Sustained If They Have A Rational Basis

In considering whether the legislative classification at issue here comports with the Due Process Clause, it is first necessary to determine the appropriate standard of review. We submit that the proper standard is the traditional rational basis test enunciated in *Dandridge* v. *Williams*, 397 U.S. 471, and recently reaffirmed in *Weinberger* v. *Salfi*, *supra*.

1. Appellant claims (Br. 39-43) that the challenged statutory provisions must be subjected to strict judicial scrutiny, since, he alleges, a suspect classification is involved. But the constitutional validity of the statutory scheme governing payment of child's survivor benefits to illegitimate children need not rest upon the showing of a "compelling governmental interest" required of statutes that discriminate on the basis of a "suspect category" such as race. Illegitimacy is not the statutory criterion but only one factor bearing upon the issue of proof of dependency. Dependency is the test and it cannot be said to constitute a "suspect category." The Social Security Act does not place illegitimate children in a unique and wholly separate category. Under Sec-

tions 202(d) and 216(h) of the Act, many, if not most, illegitimate children are entitled to the same presumption of dependency that is accorded most legitimate children. Moreover, the requirement of proving dependency in certain cases, as a condition of eligibility for child's insurance benefits, is not one imposed upon illegitimate children alone. Legitimate children who have been adopted by a person other than the wage-earner and stepchildren claiming under the account of a stepparent must make the same (or, in the case of stepchildren, a more stringent), showing of actual dependency. See pp. 3-5, *supra*. Thus the requirement of proof of actual dependency that appellant challenges here as discriminating against illegitimate children does not in fact discriminate against children on the basis of illegitimacy; that requirement is imposed in a variety of circumstances where the more readily documented facts pertaining to the relationship between the wage-earner and the child do not of themselves suggest the likelihood of actual dependency.

But even if we assume, *arguendo*, that the statute does discriminate in the manner appellant contends, that fact alone would not subject the statute to strict scrutiny. Illegitimacy has not been, nor should it be, declared a "suspect category." Illegitimacy of birth differs importantly from the categories that have been viewed as suspect and hence subject to strict scrutiny. Illegitimacy is not a highly visible characteristic, and the status can be changed. See *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687. Accordingly, this Court has used the traditional "reasonable basis" standard to distinguish between statutes that classify individuals on the basis of legitimacy of birth without adequate justification and those that, as here, employ such a classification to further appropriate governmental interests. See *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619; *Gomez* v. *Perez*, 409 U.S. 535; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164; *Labine* v. *Vincent*, 401 U.S. 532; *Levy* v. *Louisiana*, 391 U.S. 68; *Glona* v. *American Guarantee Co.*, 391 U.S. 73; *Jimenez* v. *Weinberger*, 417 U.S. 628.

This Court has, in recent years, frequently been importuned to expand the category of "inherently suspect" classifications and thereby accord additional groups the extraordinary protection entailed by the requirement that such classifications be supported by "compelling government interests"—a requirement that, for all practical purposes, is never met. See Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1535, n. 9 (1974). Thus, in addition to illegitimates, the elderly (*McIlvaine* v. *Pennsylvania State Police*, 6 Pa. Cmwlth. 505, 296 A.2d 630, affirmed, 454 Pa. 129, 309 A.2d 801, appeal dismissed for want of a substantial federal question, 415 U.S. 986), the poor (*San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1), and women (*Frontiero* v. *Richardson*, 411 U.S. 677; *Kahn* v. *Shevin*, 416 U.S. 351; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636), have urged this

Court to give strict scrutiny to classifications affecting them, and in each instance the Court has declined to do so. In view of these decisions, there would appear to be no basis upon which to distinguish classifications based upon illegitimacy from other classifications that have not been elevated to "suspect" status. The traditional "reasonable basis" test is sufficient to safeguard the interest of the class appellant seeks to represent, and it preserves Congress' prerogative to legislate with respect to that class in a manner designed to further appropriate governmental interests.

2. This Court summarized the "rational basis" test in *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

In *Weinberger* v. *Salfi*, *supra*, slip op. at 16-18, the Court reaffirmed the applicability of the "reasonable basis" test in cases, such as this one, arising under social welfare legislation. See also *Richardson* v. *Belcher*, 404 U.S. 78; *Flemming* v. *Nestor*, 363 U.S. 603.

Since this case, like *Salfi*, *Dandridge*, *Richardson*, and *Nestor*, involves not "freedoms guaranteed by the Bill of Rights" (*Dandridge*, *supra*, 397 U.S. at 484), but benefits provided by statute "[i]n the area of * * * social welfare" (*id.* at 485), the traditional "rational basis" test governs the validity of the Social Security Act provisions here in question. Thus, the challenged statutory classification must be sustained if there is any rational reason for that classification; and "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Flemming* v. *Nestor*, *supra*, 363 U.S at 612 (citations and footnote omitted).

3. The three-judge district court below, however, sustained the classification under a stricter, intermediate test, under which a challenged classification "must bear a direct and primary correlation to an *actual* statutory goal or purpose" (A. 38; emphasis supplied). The court apparently applied that standard of review both because it concluded that this Court had abandoned the traditional test (A.

37), and because it considered that a somewhat more stringent scrutiny was required of "laws dealing with illegitimacy" (A. 39). We believe that the court erred in departing from the "reasonable basis" test which, as we have shown above, this Court has not abandoned but, to the contrary, has applied in recent cases involving classifications based upon legitimacy. But we now show that the statutes here in question both have a "reasonable basis" within the meaning of the traditional test and, as the court below correctly determined, are reasonably designed to achieve the actual legislative purpose of "replac[ing] the support lost to a child when the wage earner dies" (A. 46).

B. The Statutes Have A Rational Basis And Further The Legislative Purpose

1. *Child's survivor benefits are designed to replace the support lost by virtue of the wage-earner's death*

Appellant fundamentally misconceives the congressional intent underlying the statutory scheme for the payment of child's survivor benefits. His case rests upon the assumption that Congress intended to provide, *inter alia*, a new source of support for a child who had never received assistance from the wage-earner during his lifetime, simply on the basis of the child's inchoate right, never asserted or recognized during the wage-earner's lifetime, to the wage-earner's support under state law. It is, to the contrary, clear that Congress intended only to replace

the support that was lost by virtue of the wage-earner's death and had no intention of furnishing benefits on the basis of an inchoate right to support, such as that now claimed by appellant, that was not asserted or recognized, either formally or casually, during the wage-earner's lifetime. As this Court has observed, "the primary purpose of [child's insurance benefits] is to provide support for *dependents* of a * * * wage earner." *Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 634 (emphasis added). See also *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), affirmed, 409 U.S. 1069; *Watts* v. *Veneman*, 476 F.2d 529, 533 (C.A.D.C.).

The plain language of the statutory provisions at issue here, as well as the pertinent legislative history, demonstrates that child's survivor benefits are social *insurance* benefits intended to replace lost support and not *welfare* benefits intended to assist needy persons whether or not they had any economic relationship with the deceased wage-earner. Cf. *Gainville* v. *Richardson*, 319 F. Supp. 16 (D. Mass.).[12] Section 202

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[12] Appellant suggests (Br. 57) that his need for benefits is greater than those who were supported by their deceased fathers and thus that a decision to exclude him from benefits is unfair. But that contention concerns a matter of nonconstitutional social policy peculiarly within the province of Congress, which has the responsibility for allocating the finite public funds available for social welfare. See *Dandridge* v. *Williams*, *supra*, 397 U.S. at 487; *Weinberger* v. *Salfi*, *supra*, slip op. at 29-33.

(d)(1)(C) of the Social Security Act expressly restricts eligibility for child's insurance benefits to children who were "dependent upon [the wage-earner]." The Senate Report on the 1965 Amendments to the Act—which added the provisions challenged here—correctly describes the Act as a "national program that is intended to pay benefits to replace the support lost by a child when his father * * * dies * * *." S. Rep. No. 404, 89th Cong., 1st Sess. 110 (1965).

The congressional intent also is directly inferable from the structure of the statutory scheme. The basic eligibility requirement is, as we have seen, that the child have been "dependent upon [the wage-earner]." But Congress understandably chose to avoid imposing upon claimants and the Secretary the necessity of case-by-case determinations of the fact of dependency. Instead, Congress provided a short-cut procedure for proving actual dependency by circumstantial evidence. Thus dependency is presumed where the readily documented facts pertaining to the relationship between the wage-earner and the child suggest the likelihood of actual dependency, *i.e.*, dependency is presumed where the child is able to show (1) that he is the legitimate child of the wage-earner and has not been adopted by another individual or (2) that he is the illegitimate child of the wage-earner as a result of a legal impediment to the validity of his parents' marriage ceremony or (3) that the wage-earner had acknowledged the child in writing, had been decreed by a court to be the child's parent, or had been ordered by a court to contribute to the

child's support as a parent. Sections 202(d)(3), 216(h)(2)(B) and (h)(3)(C)(i). Where proof of such facts is not available, dependency will further be presumed if the child can establish that the wage-earner was his parent and was living with him at the time of death; the fact of cohabitation is accepted as circumstantial proof of the fact of support, which ordinarily may be more difficult to establish. Section 202(d)(1)(C)(ii). Direct proof of actual support is required only when the more readily documented circumstantial proof is not made. But it is expressly required, of legitimate children and stepchildren as well as of illegitimates, when other proof fails. This statutory structure, which is undergirded by the requirement that the child be "dependent upon [the wage-earner]," "belies the conclusion that the Act is directed to *potential* dependency" (A. 47; emphasis supplied).[13] Thus the district court correctly concluded (A. 50):

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[13] In contending that Congress intended to furnish benefits to all children who had an inchoate right to support from the wage-earner during his lifetime, appellant refers (Br. 49) to the statement in the Conference Committee Report on the 1965 Amendment to the Act (111 Cong. Rec. 18387 (1965)):

> A child would be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or *had a legal obligation to do so.* [Emphasis added.]

As the district court observed, however (A. 47, n. 6), the italicized language upon which appellant relies "was not speaking of § 416(h)(3)(C)(ii) alone, but was also talking in reference to § 416(h)(3)(C)(i) which established the

> [Appellant's] problem—and the underlying reason for his failure to qualify—is that the child's insurance benefits provisions of the Social Security Act were never intended to cover [him] or the class he represents. These provisions were designed, not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended.

2. *The statutory scheme has a reasonable basis and furthers the legislative objective*

a. The district court correctly held that the statutory scheme outlined above is a means of carrying out the legislative purpose of providing replacement benefits and serves the government's legitimate interest in requiring some showing, on the part of children applying for benefits, from which dependence upon the deceased wage-earner may be reasonably inferred. Dependency is the predicate for the payment of child's insurance benefits. The provisions appellant challenges merely impose the burden of proving actual dependency on claimants who have failed to make a satisfactory circumstantial showing of dependency, *i.e.*, on claimants who have failed to prove circumstances from which the likelihood of dependence can reasonably be inferred. Thus appellant's underlying contention is that the circumstantial evidence that the Act, through the statutory presumptions, accepts as proof of dependency is not a sufficient

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paternity decree, court order, or written acknowledgement test"—circumstances which generally create a legal entitlement to support.

basis from which the fact of dependency can be reasonably inferred.

Appellant argues that many children, legitimate and illegitimate, who are given the benefit of the statutory presumptions could not in fact prove dependency any more than he can. Thus, in effect, appellant objects to the generosity of the presumptions and contends that since Congress is willing to presume support on the basis of less than conclusive evidence, it may not reasonably refuse to provide benefits even in cases where there is neither any basis from which to presume support nor any evidence of actual support. But as this Court recently re-emphasized in *Salfi* (slip op. at 24-33), legislative classifications need not be drawn with mathematical accuracy. Indeed, the classification at issue in *Salfi* was at least equally subject to the type of attack appellant makes here, since it is evident that a woman who marries a wage-earner less than nine months before his death is often not motivated by a desire to receive survivors' benefits; nevertheless, that categorization was reasonably related to the desire to avoid the payment of survivors' benefits in the case of marriages that were so motivated. Similarly, although many children deemed dependent under the Act may in fact not be dependent, the presumptions employed by the Act serve the legitimate purpose of ensuring payment of benefits to all actually dependent children while avoiding imposition of the administrative burden that would be entailed by case-by-case dependency determinations.

These statutory presumptions are not unreasonable. As the district court observed with regard to the categories of illegitimates now entitled to the presumption of dependency (A. 48-49):

> When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not. To presume the child's paternity and dependency is rational.[14]

Although legitimates are broadly presumed dependent upon their parents, this presumption has

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[14] The statute also affords the dependency presumption to illegitimates born of a marriage invalid because of the existence of a non-obvious legal impediment at the time of marriage. Section 216(h)(2)(B). That presumption is justifiable because the wage-earner intends his child to be legitimate, and thus has signified his readiness to assume the responsibility of support.

In *Jiminez* v. *Weinberger*, 417 U.S. 628, 631, n. 2, this Court observed, in passing, that illegitimate children who can inherit their parent's personal property under the pertinent state intestacy laws are entitled to child's survivor benefits. This observation was, we believe, based upon a misreading of the Act. The requirement that certain illegitimate children must establish dependency is not affected by whether the child would inherit from the wage-earner under

ample support in human experience. Congress properly determined that the circumstances in which the presumption would be erroneous were likely to be so few that the risk of making payments to non-dependents was outweighed by the savings inherent in avoiding case-by-case dependency determinations for all legitimate children. Moreover, when Congress was able to isolate a class of legitimate children with regard to whom the presumption might be generally unsound, it denied the presumption. Thus adopted children seeking to recover on the account of their legitimate natural parent, or children seeking to recover on the account of a stepparent, are required to prove cohabitation with or actual support from the wage-earner. In cases where there is no cohabitation, there is so scant a likelihood of the child's dependence upon the wage-earner, that Congress has required the same showing as is required of the subclass of illegitimate children that appellant represents. The challenged statute, therefore, as the district court said, "does not treat legitimate children differently from illegitimate children; what it does is treat differently those likely to be the dependent children of the wage earner from those not as likely to be by requiring further or substantiating proof from the lat-

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the state's intestacy laws. Relationship as a child of the wage-earner for purposes of state intestacy laws establishes only the applicant's status as a "child"; it does not establish either legitimacy or dependency. See Sections 202(d)(3) and 216(h)(2)(A); Social Security Claims Manual §§ 2408, 2418, 2421 (March 1975); Social Security Ruling 61-48, 1960-1961 Cum. Bull. 31.

ter" (A. 49). The reasonableness, and hence the constitutionality, of a statutory requirement of proof in these circumstances is manifest.[15]

b. This Court has consistently recognized the "lurking problems with respect to proof" of claims asserted by illegitimate children to benefits earned by their putative fathers (*Gomez* v. *Perez*, 409 U.S. 535, 538) and has indicated that a requirement of proof of dependency is an appropriate limitation on such claims. Thus, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 174-175, while holding that there was no rational basis for a Louisiana statute that distinguished between two classes of dependent illegitimate children, this Court emphasized the propriety of a dependency test:

> Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful-death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased,

[15] *Frontiero* v. *Richardson*, 411 U.S. 677, is inapposite here. That decision involved a legislative classification broadly distinguishing between men and women, requiring all members of the latter class to prove the dependency of their spouses, while affording a conclusive presumption to the former. In striking down the statute involved in *Frontiero*, the Court held that administrative convenience would not justify the wholesale discrimination involved in that case. In contrast, the statute challenged here does not broadly distinguish between legitimate and illegitimate children, but affords the benefit of the presumption to all classes of children to which it may reasonably be afforded.

> Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood. Our decision fully respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and it avoids altogether diffuse questions of affection and affinity which pose difficult probative problems. [Footnote omitted.]

Thus the Court in *Weber* specifically approved the requirement that an illegitimate child prove dependency and paternity (406 U.S. at 174, n. 12), a requirement that was not significantly different from the challenged provisions here, which require proof of both paternity and dependence. In both cases, the dependency requirement tends to eliminate the need to make paternity decisions in doubtful cases, and thus, as this Court noted in *Weber*, to simplify problems of proof of paternity.[16]

c. Finally, it should be emphasized that the statutory scheme challenged by appellant does not establish the "blanket and conclusive exclusion of * * * illegitimates" (*Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 636) which this Court has so frequently condemned

[16] Contrary to appellant's contention (Br. 61-70), the fact that the statute requires independent proof of paternity and has other provisions to guard against fraudulent claims does not preclude the possibility that one of the purposes of the dependency requirement was to simplify problems of proof by eliminating a substantial category of cases in which proof could be expected to be particularly difficult and fraud most likely.

as violative of the Constitution. See *Levy* v. *Louisiana*, 391 U.S. 68, and *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (invalidating the portion of Louisiana's wrongful death statute that barred illegitimate children, and their parents, from recovering for wrongful death); *Gomez* v. *Perez*, *supra* (invalidating a Texas statute denying illegitimate children a judicially enforceable right to support from their fathers while granting such a right to legitimates); cf. *Weber* v. *Aetna Casualty & Surety Co.*, *supra*. Thus in *Jimenez* the Court invalidated Section 216 (h)(3)(B) of the Social Security Act, which barred a subclass of illegitimates from even making a showing of dependency upon the wage-earner, and remanded the case to provide the claimants with an opportunity to prove that critical fact. The district court properly held in the instant case that *Jimenez* does not impugn the validity of the statute at issue here, which grants benefits to any illegitimate child who establishes his dependence on his deceased parent (A. 76):

> [T]he thrust of that opinion was that Eugenio and Alicia Jimenez, and the members of their class, could not be refused benefits without their first being afforded a realistic opportunity to prove that they were living with their parent or supported by him.[17]

[17] The district court also correctly observed that the statute does not contain the vice of "underinclusiveness" present in *Jimenez*. While there may be "*nondependent* children who cannot recover, there will be no *dependent* children who are unable to prove dependency at the requisite time" (A. 77).

That opportunity was adequately furnished appellant in this case.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1975.

STATUTORY APPENDIX

Section 202, 42 U.S.C. 402

* * * * *

(d) Child's insurance benefits.

(1) Every child as defined in section 216(e) of this Act of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 223(d) of this Act which began before he attained the age of 18, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits.

shall be entitled to a child's insurance benefit * * *.

* * * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) of this Act shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or a stepmother at the time specified in paragraph (1)(C) of this subsection, if, at such time, the child was living with or was receiving at least one-half of his support from such stepfather or stepmother.

* * * * *

Section 205, 42 U.S.C. 405

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(g) Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after

the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the

Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of the Judicial Code of the United States to recover on any claim arising under this subchapter.

* * * * *

Section 216, 42 U.S.C. 416

* * * * *

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, and (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother

or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

* * * * *

(h) Determination of family status.

* * * * *

(2) (A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such

insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * * * *

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to

have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

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